STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff-Appellee,

v

TED MILLER and 3 D MERCHANDISE BROKERS, INC,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 231923
Washtenaw Circuit Court
LC No. 00-001066-CZ

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendants Ted Miller and 3 D Merchandise Brokers, Inc. appeal as of right the trial court's order granting plaintiff Ypsilanti Charter Township's (Township) request for an injunction barring defendants from operating a secondhand dealer's business without a license. Because we, like the circuit court, find that the ordinance at issue is constitutional, we affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Material Facts and Procedural History

The material facts in this case are not in dispute. Approximately twelve years ago, the Township adopted an ordinance regulating pawn shops and secondhand dealer businesses. At the time, state law only regulated secondhand dealers who operated within cities and villages, see MCL 445.401 *et seq*. and MCL 445.471 *et seq*., and therefore secondhand dealers operating within townships were unregulated. The ordinance dealing with secondhand dealers is set forth in Article 3, Divisions 1 – 3 of the Ypsilanti Charter Township code.

From 1990 to 1995 defendant Ted Miller applied for and received a secondhand dealer license from the Ypsilanti Township board. In 1997, however, Miller failed to apply for a secondhand dealers' license. Between 1997 and February 2000, discussions were held between the Township and defendant regarding the renewal of his license. After unsuccessful negotiations, the Township filed suit seeking to enjoin the operation of defendant's unlicensed secondhand broker dealership.

After considering the briefs and arguments of the parties, the circuit court granted the Township's request for an injunction which barred defendant's from operating a secondhand dealer's business within the township without a license. The court reasoned that the definition of

a "secondhand dealer" set forth in Ordinance § 22-81 was not so vague that it violated defendant's right to due process of law. Defendant's appeal that decision to this Court, and we now affirm.

II. Analysis

The only issue on appeal is whether Ypsilanti Township Ordinance § 22-81's definition of "secondhand dealer" is so vague that it offends the requirements of due process of law set forth in the Michigan and Federal Constitutions.[1] We review this issue de novo, as it presents a question of law. *Saginaw Co v John Sexton Corp,* 232 Mich App 202, 222; 591 NW2d 52 (1998).

The ordinance at issue, § 22-81, defines a "secondhand dealer" as follows:

> Secondhand dealer or junk dealer means any person, corporation, or member of a co-partnership or firm whose *principal business* is that of purchasing, storing, selling, exchanging and receiving secondhand personal property of any kind or description (emphasis added).[2]

Defendant's contention before the circuit court and again on appeal is that the phrase "principal business" is too vague to allow businesses within the township to determine whether they would be subject to the licensing requirements of the ordinance.

We begin by recognizing that all statutes and ordinances are given a strong presumption of constitutionality. *Taylor Commons v Taylor,* 249 Mich App 619, 625; 644 NW2d 773 (2002). Accordingly, "courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *Wysocki v Felt,* 248 Mich App 346, 355; 639 NW2d 572 (2002), citing *Mahaffey v Attorney General,* 222 Mich App 325, 344; 564 NW2d 104 (1997). As we held in *Wysocki, supra* at 355, "[t]he court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract." *Id.,* citing *General Motors Corp v Attorney General,* 294 Mich 558, 568; 293 NW2d 751 (1940). See also *Council of Organizations and Others for Education About Parochiaid, Inc v Governor,* 455 Mich 557, 568; 566 NW2d 208 (1997). These same rules govern the review of the constitutionality of an ordinance, *Plymouth Twp v Hancock,* 236 Mich App 197, 199; 600 NW2d 380 (1999), and it is defendant's burden to establish that the ordinance is clearly unconstitutional. *Gora v Ferndale,* 456 Mich 704, 711-712; 576 NW2d 14 (1998).

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[1] The federal due process clause is contained in US Const., Am XIV, while Michigan's is set forth in Const. 1963, art. 1, § 17. "The 'void for vagueness' doctrine is derived from the constitutional guarantee that the State may not deprive a person of life, liberty, or property without due process of law." *State Treasurer v Wilson* (*On Remand*), 150 Mich App 78, 80; 388 NW2d 312 (1986).

[2] This ordinance definition is substantially similar to that found in state law, and both definitions utilize the "principal business" phrase. See MCL 445.403.

In *Dep't of State Compliance and Rules Div v Michigan Education Ass'n – NEAA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), we set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague :

> A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it give the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated.

We also pointed out that in determining "whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings." *Dep't of State Compliance and Rules Div, supra* at 116, citing *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997) and *In re Forfeiture of 791 North Main*, 175 Mich App 107, 111; 437 NW2d 332 (1989). In line with this principle, it is critical for courts to remember that when considering whether an ordinance is void for vagueness, we do "not set aside common sense, nor is the [township board] required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise." *Dep't of State Compliance and Rules Div, supra* at 126-127. As one respected federal jurist noted, "[a]lthough the Fourteenth Amendment requires adequate notice of unlawful acts, it does not require that the language of a legislative enactment be 'mathematically' precise." *Michigan Wolfdog Ass'n, Inc v St Clair Co*, 122 F Supp 2d 794, 802 (ED Mich, 2000) (Gadola, J.). Accord *Miller v California*, 413 US 15, 28; 93 S Ct 2607; 37 L Ed 2d 419 (1973) (absolute "godlike precision" not required by the Constitution).

As previously noted, defendants vagueness challenge focuses on only one of the three possible ways an ordinance can be determined vague, that the ordinance does not provide fair notice of the conduct or persons it regulates. Thus, defendant's challenge to the ordinance does not include the assertion that the ordinance impinges upon First Amendment freedoms. This is an important facet of this case since it is well settled that "[w]hen a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined . . . without concern for the hypothetical rights of others." *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001), quoting *People v Vronoka*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Thus, "the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *Id.*

Defendant's only argument is that the ordinance's phrase "principal business" is impermissibly vague because there could be numerous hypothetical scenarios under which many businesses that ordinarily would not be considered "secondhand dealers" could fall under the definition because they sell new and used goods. We disagree. Initially we note that defendant's argument is inconsistent with the applicable standard of review. As we noted earlier in this opinion, we do not strike down legislation as unconstitutional if it could be deemed unconstitutional under any possible scenario. *Wysocki, supra.* See also *In Re Trejo Minors*, 462 Mich 341, 354; 612 NW2d 407 (2000). Indeed, the opposite is true. Only if there is no possible reasonable construction which would render the legislation constitutional must we strike it down. *Council of Organizations and Others for Education and Parochiaid, supra*. So, the fact that defendant has offered several interesting hypotheticals as to the possible application of the phrase "principal business" does not require striking down the ordinance on vagueness grounds, especially when no First Amendment rights are at stake. *Knapp, supra; Vronoka, supra.*

We also note that defendant's hypotheticals ignore the factual situation presented to the trial court. Before the trial court it was undisputed that plaintiff had interpreted "principal business" to mean that more than fifty percent of the revenue from the particular business was generated from the sale of secondhand personal property. That is why defendant had applied for a secondhand dealer license for five consecutive years and there was no evidence to dispute that that is precisely how the Township had always interpreted the ordinance. In addition, uncontested affidavits submitted by the Township showed that approximately 70% of defendant's current business is generated from secondhand sales. Application of the phrase "principal business" to mean more than fifty percent of the revenue generated from a particular business is, as the trial court noted, quite reasonable and consistent with a common understanding of that phrase. More importantly, the undisputed evidence before the trial court revealed that as applied to defendant in this case, the ordinance was not vague. *Knapp, supra.*

Like the trial court, we have found no reported Michigan cases applying the identical phrase set forth under Michigan's secondhand dealer statute, MCL 445.403. The trial court correctly noted, however, that there are decisions throughout the country that have rejected vagueness challenges to statutory phrases quite similar to that utilized by the Township in this ordinance[3]. For example, in *511 Detroit Street Inc v Kelley,* 807 F2d 1293 (CA 6, 1986) the plaintiff challenged a provision within Michigan's anti-obscenity law which provided that a person would be guilty of obscenity in the first degree if dissemination of obscene material was a predominate and regular part of a person's business at a particular establishment, and if obscene materials were a "principal" or "substantial" part of the stock and trade of that establishment. *Id.* at 1293. The district court held part of the statute unconstitutionally vague and enjoined its enforcement. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that the statute's use of such phrases as "predominate," "regular," "principal," "substantial" and "stock and trade" are phrases which are understood by ordinary people and which are utilized throughout the civil and criminal statutes and case law and therefore are not impermissibly vague. *Id.* at 1296 – 1297. Further, although the court noted that the plaintiff in that case had come up with interesting hypotheticals as to the possible application of the terms within the statute, the court noted that "the fact that there are cases near the margin where it is difficult to draw the line does not make a statute unconstitutional." *Id.*

Likewise, in *United States v Clinical Leasing Service, Inc,* 925 F2d 120 (CA 5, 1991), the defendant challenged a controlled substance statute which required that physicians file a separate registration at each "principal place of business." Defendant challenged the phrase "each principal place of business" as being unconstitutionally vague. *Clinical Leasing Service, Inc, supra* at 122. The district court rejected defendant's argument, upholding the statute in full. The Fifth Circuit affirmed, noting that although the phrase "may engender some limited amount of confusion," because the word "principal" is plainly understood by a reasonable person, it is not impermissibly vague. *Id.* at 123. Likewise, in *Joseph E Seagram and Sons Inc v Hostetter,* 384 US 35, 48-49; 86 S Ct 1254; 16 L Ed2d 336 (1966), rev'd on other grounds, 491 US 324; 109 S Ct 2491; 105 L Ed2d 275 (1989), the Supreme Court rejected a claim that the terms "principal or

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[3] Interestingly, despite having the burden of proving that the ordinance is clearly unconstitutional, defendant has not cited to a single case that holds this or a similar phrase to be unconstitutionally vague.

substantial" with respect to businesses falling within the definition of a related person under a liquor law were constitutionally invalid. We agree with the reasoning of these decisions.

We also note, as did the trial court, that the phrase "principal business" is utilized not only in the state statute governing the licensing of secondhand dealers, MCL 445.403, but is found throughout the Michigan Compiled Laws. See, e.g., MCL 38.1132f (definition of venture capital firm); MCL 211.11 (corporate property situs); MCL 289.72 (suit to recover fees due or venue provision under pure foods and standards provision); MCL 445.106 (purchases of unrelated business items by or through their employer under Unlawful Trades Act); MCL 451.413 (financial planning services definitions under the Debt Management Act); MCL 451.802 (exemptions under the Uniform Securities Act); MCL 500.8150 (conservator for alien or foreigner under the insurance code); MCL 600.946 (foreign attorneys definition). The fact that the phrase "principal business" is utilized in each of the foregoing statutory provisions does not mean that the phrase is immune from constitutional invalidity. However, it is at least a reason why we conclude that that phrase is one that is commonly understood by an ordinary person and, therefore, does "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v Rockford*, 498 US 104, 108-109; 92 S Ct 2294; 33 L Ed2d 222 (1972). See also *511 Detroit Street, Inc, supra* at 1296 ("the terms of the statute are found throughout the law and are within the understanding of ordinary people"). We do not believe that this ordinance is so vague that it "may trap the innocent by not providing fair warning." *Id.*

III. Conclusion

In light of the foregoing, we affirm the circuit court's opinion and order concluding that ordinance 22-81 is not unconstitutionally vague.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray